Federal Court of Appeal Cour d'appel fédérale

Date: 20251222

Docket: A-240-25

Citation: 2025 FCA 232

2025 FCA 232 (CanLII)

Present: **GOYETTE J.A.**

BETWEEN:

MINISTER OF NATIONAL REVENUE

Appellant

and

SHOPIFY INC.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on December 22, 2025.

REASONS FOR ORDER BY: GOYETTE J.A.

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REASONS FOR ORDER

GOYETTE J.A.

[1] The Minister of National Revenue seeks an order requiring Shopify Inc. to preserve certain data until the Minister's appeal before this Court is finally disposed of.

[2] For the following reasons, I will grant the preservation order, while varying its scope and terms.

I. Context

[3] In the spring of 2023, the Minister sought the Federal Court's authorization to impose a requirement on Shopify to provide information regarding certain persons who use Shopify's software platform to sell products and services online.

[4] Because the Minister did not know the persons' names—rather, he wanted to obtain this and other information about them—the Minister turned to subsections 231.2(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and 289(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15. These identically worded provisions provide that a Federal Court judge may authorize the requirement if the judge is satisfied that (a) there is an ascertainable group, and (b) the requirement is made to verify the tax compliance of the persons in the group. The Minister claimed to have identified an ascertainable group of merchants, and that the information was sought to verify these unnamed persons' compliance with their duties and obligations under the *Income Tax Act* and *Excise Tax Act.*

[5] The Federal Court disagreed. It found that the proposed requirement's vague and confusing terms meant there was no ascertainable group and made the requirement unworkable: *Canada (National Revenue) v. Shopify Inc*., 2025 FC 969 at paras. 94–100, 116, 122, 137–141. It also found the proposed requirement to be disproportional: Federal Court decision at paras. 262–268, 272. For these reasons, the Federal Court refused to authorize the Minister's proposed requirement.

2025 FCA 232 (CanLII)

[6] The Minister appeals the Federal Court's decision to this Court.

[7] In mid-November of 2025, after having served and filed his memorandum of fact and law, the Minister decided to deal with an issue that he had known about for quite some time but had not acted on before: Shopify's privacy and data retention policies, more specifically its policy of deleting data from inactive accounts after two years. The Minister accepts that these policies are appropriate. However, since the Minister wants to obtain information from the six years preceding the date when a court might authorize the proposed requirement, deleting data from inactive accounts means that some information will be lost. For instance, if an account was active during years 1 and 2, but inactive in years 3 and 4, data from this account would be deleted in year 5 and no longer available. Through his motion, the Minister wants to preserve this data to verify compliance with the *Income Tax Act* and *Excise Tax Act*.

[8] After the parties were unable to come to terms on this issue, the Minister filed an *ex parte* motion seeking an interim order under Rules 374 and 377 of the *Federal Courts Rules* (SOR/98-106) for the preservation of evidence in the possession of Shopify, including information related to inactive accounts. On December 3, 2025, the Court issued the interim preservation order sought by the Minister until December 17, 2025. On the day the interim order was due to expire, the Court ordered its renewal until today.

[9] Prior to the expiry of the interim preservation order, the Minister served on Shopify and filed with this Court a notice of motion seeking two orders: 1) an order under Rules 3, 373, 374 and 377 renewing the interim preservation order, and 2) an order under Rules 373 and 377

2025 FCA 232 (CanLII)

requiring Shopify to preserve certain data until the Minister's underlying appeal before this Court is finally disposed of. This second order will be referred to as the "second preservation order".

2025 FCA 232 (CanLII)

[10] Shopify takes the position that the Minister obtained the interim preservation order improperly by moving *ex parte* without any basis to do so and by failing to make full and frank disclosure to the Court. On that basis, Shopify asks this Court to set aside the interim preservation order. That issue is moot since the order expires today.

[11] Shopify also opposes the motion for the second preservation order. It says that the legal criteria for granting such an order are not met.

II. The Criteria for Issuing the Order Are Met

[12] To determine whether to issue a preservation order, a court applies the three-part test for granting an interlocutory injunction set out in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311, at p. 334. That test requires the Minister to show that there is a serious issue to be determined, that he will suffer irreparable harm if the order is not granted, and that the balance of convenience favours granting the order.

A. *There is a Serious Issue to be Tried*

[13] For prohibitive injunctions—those that restrain a person from committing a specified act—the threshold at the serious issue stage is low: *Canada (Attorney General) v. Bertrand*,

2021 FCA 103 at para. 6, citing *RJR-MacDonald* at p. 337. The Minister satisfies it since his appeal is not frivolous or vexatious: *RJR-MacDonald* at p. 337.

2025 FCA 232 (CanLII)

[14] However, Shopify says the second preservation order is in the nature of a mandatory injunction—one that requires a party to take positive action before the court decides the merits of the litigation—so the Minister faces a higher threshold. He must do more than show that there is a serious issue to be tried. He must show that he has a case of such merit that his appeal is very likely to succeed.

[15] The Supreme Court of Canada has confirmed Shopify's assertion that applicants for mandatory interlocutory injunctions must show a strong likelihood of success: *R. v. Canadian Broadcasting Corp*., 2018 SCC 5 at paras. 16–17. In this regard, the Supreme Court acknowledged that distinguishing between mandatory and prohibitive injunctions can be hard since an interlocutory injunction framed in prohibitive language may have the effect of forcing the enjoined party to take positive actions: *Canadian Broadcasting Corp.* at para. 16. To resolve this enigma, one should examine whether, in substance, the overall effect of the injunction would be to require the enjoined party to "*do* something, or to *refrain from doing* something": *Canadian Broadcasting Corp.* at para. 16 [emphasis in original].

[16] I find that the substance of the second preservation order is to require Shopify to restrain from deleting information rather than to do something. It is worth nothing that in an affidavit that Shopify filed, the affiant explains that the interim preservation order required Shopify "to retain data that [it] would otherwise delete": Affidavit of Rachelle Bastarache, at para. 43. This is

different from a proposed order the Federal Court recently reviewed in *Rebel News Network Ltd.*, where the applicant wanted the respondent to take positive steps, that is, to "reinstitute and/or reactivate" a social media account. The Federal Court found such relief to be mandatory in nature: *Rebel News Network Ltd v. Lametti*, 2024 FC 270 at para. 38. The second preservation order essentially requires Shopify to refrain from deleting data. It is somewhat akin to the act of not de-activating software, a requirement that was ruled prohibitive: *Cash Cloud v. BitAccess*, 2022 ONSC 5622 at para. 44.

2025 FCA 232 (CanLII)

[17] In light of the above, Shopify's argument that the second preservation order is mandatory and calls for a higher threshold fails. It is therefore necessary to determine whether the Minister will suffer irreparable harm if the second preservation order is not granted.

B. *Public Interest Suffers Irreparable Harm*

[18] The threshold for establishing irreparable harm is a high one. As a rule, the person who seeks the order—here, the Minister—must adduce evidence to prevail: *Bertrand* at para. 10; *Fournier Pharma Inc. v. Apotex Inc.*, (1999), 1999 CanLII 7961 (FC) at para. 6. That said, courts can sometimes presume or infer irreparable harm: *RJR-MacDonald* at p. 342; *Bertrand* at para. 10; *Canada (Attorney General) v. Simon*, 2012 FCA 312 at para. 37.

[19] In the present matter, there is no denying that as time goes by some accounts reach the point of having been inactive for two years with the consequence that data from these accounts is no longer available to the Minister for the purpose of verifying whether the accounts holders comply with tax legislation. Shopify refers to the unavailable information as a "small subset" of

the information sought by the Minister but provides no evidence to support this assertion. Moreover, the Supreme Court tells us that "irreparable" refers to the nature of the harm, not its magnitude. It is harm which either cannot be quantified in monetary terms or cured: *RJR-MacDonald* at p. 341. This is the irreparable harm in the present matter.

[20] On the other hand, unexplained delay in seeking interlocutory relief—here, a preservation order—may serve as evidence that the party seeking the relief does not think that there exists irreparable harm: Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1992) (loose-leaf updated 2025, release 1), ch. 1 at § 1:28 (WL Can); *Canada (Attorney General) v. Oshkosh Defense Canada Inc*., 2018 FCA 102 at para. 23; *Turbo Resources Ltd. v. Petro Canada Inc. (C.A.),* [1989] 2 FC 451 (FCA) at p. 478.

[21] In this case, the Minister delayed bringing a motion for a preservation order for almost two years without explanation. Evidence adduced by Shopify shows that the Minister has been aware of Shopify's policy of deleting data from inactive accounts since January of 2024, when Shopify served and filed its supporting affidavit evidence in the Federal Court. Yet the Minister did not ask the Federal Court to issue a preservation order, nor did he ask this Court to issue a preservation order or to expedite the hearing when he appealed. Instead, the Minister waited until after he had served his memorandum of fact and law, when the clock had started ticking for Shopify to produce its memorandum, to bring his motion for an interim preservation order, and subsequently this motion.

2025 FCA 232 (CanLII)

[22] The Minister's actions make it difficult to rule in his favour on the issue of irreparable harm. However, *RJR-MacDonald* tells us that irreparable harm to the public interest should be considered: *RJR-MacDonald* at p. 349; *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2007 BCCA 221 at paras. 10–14. It also tells us that the Minister's conduct does not negate the harm to the public interest—in this case, the harm that would ensue if the data were deleted: *RJR-MacDonald* at pp.346 and 348. Simply stated, even though the Minister is the guardian of public interest (*Canadian Federation of Students* at para. 14), that interest should not be assessed based on the Minister's conduct.

[23] What is the public interest? Public interest encompasses the interests of society as a whole: *RJR-MacDonald* at p. 343. In the case at hand, Canadian society has a legitimate interest in the Minister's exercise of his statutory mandate to verify compliance with tax legislation: *Fortius Foundation v. Canada (National Revenue)*, 2022 FCA 176 at para. 39. How is that interest harmed? That interest suffers irreparable harm when information that could be relevant to verify compliance with tax legislation is deleted. On that basis, I find that the Minister, as guardian of the public interest, will suffer irreparable harm if the second preservation order is not granted.

C. *The Balance of Convenience Favours the Public Interest*

[24] The last part of the test to determine whether to grant the second preservation order involves "a determination of which of the two parties will suffer the greatest harm" from the granting or refusal of the order: *RJR-MacDonald* at p. 342, citing *Manitoba (Attorney General) v. Metropolitan Stores Ltd.,* [1987] 1 S.C.R. 110 at p. 129.

2025 FCA 232 (CanLII)

2025 FCA 232 (CanLII)

[25] The public interest attracts significant weight in the balance of convenience analysis: *Fortius Foundation* at para. 39; *Universal Ostrich Farms Inc. v. Canada (Food Inspection Agency)*, 2025 FCA 164 at para. 50. The harm to public interest was discussed above.

[26] Against that harm, the Court must weigh the harm to Shopify as supported by evidence.

[27] Having some context makes it easier to appreciate the harm Shopify will suffer if the second preservation order is granted. Recall that the Federal Court refused to authorize the requirement sought by the Minister largely because its terms were too vague to identify an ascertainable group and because it was disproportional.

[28] Although the Minister is appealing Federal Court's decision to deny the proposed requirement, he says that he has modified the relief sought in the underlying appeal and the terms of the second preservation order in accordance with the Federal Court's reasons. However, he has not changed the terms that, according to the Federal Court, made the requirement disproportional.

[29] Shopify replies that despite these changes, integrating the terms proposed by the Minister in the second preservation order would cause it harm in three main ways. First, these terms do not specify a time period. Second, they still require Shopify to preserve information relating to accounts "associated with" a Canadian address, a phrase that the Federal Court has found confusing. This ambiguous language would force Shopify to maintain a worldwide freeze on the

deletion of data contrary to its privacy and data retention policies. Third, the second preservation order would oblige Shopify to maintain more data and incur additional maintenance costs.

[30] With respect to the first harm, Shopify is right that the second preservation order needs to specify a time period. This is something that can easily be done.

[31] As for the second harm, it is true that the Federal Court found the phrase “associated with” confusing. However, these findings were in respect of a) a part of the proposed requirement that referred to “any person(s) associated with the Shopify account” (see Federal Court decision at paras. 97 and 198); and b) another part that referred to “a Canadian address when registering”: Federal Court decision at paras. 97, 198, 99, 137 and 141. Since the terms of the second preservation order proposed by the Minister do not include these confusing passages, this issue is fixed. The Federal Court also accepted Shopify’s argument that the phrase “associated with” and certain types of data requested made the Minister’s proposed requirement disproportional: Federal Court decision at paras. 240–244, 262–268. But the Federal Court identified the types of data that, if not requested, would have likely been acceptable to Shopify and resolved this issue: Federal Court decision at para. 268. Not including these types of data in the second preservation should therefore minimize Shopify’s harm.

[32] Finally, concerning the third harm alleged by Shopify, it bears noting that since Shopify has not quantified the costs of maintaining additional data, it is hard for the Court to appreciate the harm that it suffers.

2025 FCA 232 (CanLII)

[33] In light of the foregoing, adapting the terms of the second preservation order and expediting the hearing of the appeal should minimize the harm that Shopify says it will suffer if the order is granted. Consequently, I find that the balance of convenience favours the public interest and the granting of the order.

2025 FCA 232 (CanLII)

III. The Terms of the Second Preservation Order Must be Adapted

[34] The *RJR-MacDonald* test is context-specific and ultimately serves to determine whether granting the order sought is "just and equitable in all of the circumstances of the case": *Google Inc. v. Equustek Solutions Inc*., 2017 SCC 34 at para. 25; *Fortius Foundation* at para. 15; *Universal Ostrich Farms* at para. 14.

[35] It will be for the panel that will hear the Minister's appeal to rule on the merits of the Federal Court's decision, including its findings of how the proposed requirement should have been drafted to have been authorized. In the meantime, the Court must determine the terms of the second preservation order that would make it just and equitable to grant such order. Adopting the Federal Court's suggestions, which are seemingly agreeable to both the Minister and Shopify, appears the best solution in the circumstances. The second preservation order will be drafted accordingly.

IV. Costs and Undertaking

[36] The last items to be addressed are costs and the undertaking that a party applying for an interlocutory injunction must typically provide regarding damages

[37] On costs, even though the Minister's motion is granted, the Court will not award costs. This is because: 1) respectfully, the Minister's representations were unclear and not of much assistance to the Court; and 2) the Minister asked the Court to rule on the motion on an expedited basis after having delayed bringing the motion for almost two years.

[38] As concerns the undertaking, Rule 373(2) provides that unless a judge orders otherwise, a party bringing a motion for an interlocutory injunction shall undertake to abide by any order concerning damages caused by the granting or extension of the injunction. The Minister gave an undertaking but simultaneously asked for leave to withdraw it. In the circumstances, I am not convinced that leave should be granted.

V. Conclusion

[39] For these reasons, an order for preservation of information and for the appeal to proceed on an expedited basis will be issued.

"Nathalie Goyette"

J.A.

2025 FCA 232 (CanLII)

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-240-25
STYLE OF CAUSE:	MINISTER OF NATIONAL REVENUE v. SHOPIFY INC.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	GOYETTE J.A.
DATED:	DECEMBER 22, 2025

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2025 FCA 232 (CanLII)